Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),[1] through undersigned counsel, hereby offers the following comments in support of the Joint Petition for Partial Clarification or Reconsideration of the *Fourth Report and Order*, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 01-204 (rel. Aug. 8, 2001) (the "*Collocation Remand Order*"), filed in the captioned proceeding (the "Petition").[2]

The Petition urges the Commission to clarify both "its intent to enforce its cross-

[1] ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services. ASCENT is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

[2] The Petition was jointly filed by the Association for Local Telecommunications Services. ("ALTS"), e.spire Communications, Inc. ("e.spire"), KMC Telecom, Inc. ("KMC"), McLeodUSA Telecommunications Services, Inc. ("McLeodUSA), and NuVox, Inc. ("NuVox") (collectively, the "Joint Petitioners").

connect rules and resolve disputes,"[3] and "that ILECs subject to collocation rules must set forth rates, terms and conditions for cross-connects in their federal tariffs".[4] As to the first point, ASCENT believes the *Collocation Remand Order*, as well as the rules adopted by the Commission, make clear the Commission's intent to continue vitally enforcing its enunciated rules, including the new cross-connect rules. To the extent that any ambiguity exists, however, ASCENT supports the Joint Petitioners' request for a clear statement from the Commission confirming this intent. As to the latter point, ASCENT agrees with the Joint Petitioners that to the extent an incumbent is providing cross-connects to a competitive carrier which is providing jurisdictionally significant interstate traffic, that cross-connect services is a "'communications service . . . within the meaning of section 201(a)";[5] that is, a federal communications service, which must be tariffed at the federal level.

In the *Collocation Remand Order*, the Commission identifies two separate grounds supporting its conclusion that incumbent local exchange carriers ("LECs") must provision cross-connects to collocators; namely, Section 201, since the refusal of an incumbent LEC to provision cross-connects would constitute an unjust, and reasonable and thus unlawful practice, and Section 251(c)(6), since such a refusal would also constitute a violation of the incumbent LEC's obligation to provide collocation terms and conditions on a nondiscriminatory basis. It is in its discussion of the Section 251(c)(6) ground that the Commission issues the statement which concerns the Joint Petitioners, that "we anticipate that cross-connect disputes, like other interconnection related

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[3] Petition, p. 2.

[4] Id., p. 8.

[5] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Fourth Report and Order), CC Docket No. 98-147, FCC 01-204 at ¶ 63.

disputes, can be addressed in the first instance at the state level."[6]

[6] Id. at ¶ 84.

The Joint Petitioners read this statement, ASCENT believes inaccurately, as a profession of unwillingness on the part of the Commission to enforce its promulgated rules, leaving open the possibility that an incumbent LEC might evade its cross-connect obligations by engaging in dilatory tactics before 50 separate forums to the economic and competitive disadvantage of competitive LECs. That section of the *Collocation Remand Order* addressing cross-connects between collocators reveals a strong commitment by the Commission to ensuring the availability to competitive LECs of cross-connects from incumbent LECs.[7] The Commission has held that the absence of an obligation to provide cross-connect services to competitive LECs would permit incumbent LECs to "severely impede the deployment of the innovative, competitive services that the 1996 Act seeks to facilitate."[8] It is virtually unthinkable that having also been tasked with promulgating and enforcing rules in furtherance of the local competition and other aspects of the Telecommunications Act, the Commission would decline to act to enforce its own rules whenever a violation of those rules is alleged.

The Commission's statement, then, must logically be interpreted merely as an acknowledgment by the Commission that when cross-connect disputes arise within the context of an interconnection proceeding before a state commission, attempts at obfuscation will be thwarted as an immediate and preliminary matter by that state commission, which cannot and will not sanction "the refusal to provision such cross-connections" since such action "would be discriminatory toward

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[7] Id. at ¶¶ 55 - 84.

[8] Id. at ¶ 64.

competitive LECs"[9] and violative of the incumbent LEC's "duty to provide collocation terms and conditions that are *nondiscriminatory* pursuant to section 251(c)(6)."[10]

Providing a clear and concrete example of the potential anticompetitive results which would flow from a failure to enforce the cross-connect rules, the Commission continued

> because incumbents provide cross-connects within their premises to those collocators that purchase the incumbents' transport services, an incumbent LEC's failure to provide cross-connects within its premises to collocators that wish to utilize a competitive transport provider also raises this nondiscrimination issue. Specifically, we find that it would be discriminatory not to provide such cross-connects because of the vast disparity in costs and efficiency associated with the two alternatives. In fact, a failure to provide cross-connects would in effect force the competitive LEC to purchase incumbent LEC transport in order to access a competitive provider's transport services.[11]

With this in mind, it is unlikely that a state commission would fail to insist that incumbent LECs fulfill their obligation to provide collocation on nondiscriminatory terms and conditions, including the obligation to provide cross-connect services to competitive LECs consistent with the *Collocation Remand Order*. In any event, an aggrieved carrier could always look to the Commission for redress of its claims, availing itself, for example, of the Enforcement Bureau's "rocket docket" which has been specifically designed to provide rapid adjudication of carrier-to-carrier disputes impacting the development of local competition.[12]

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[9] Id. at ¶ 82.

[10] Id.

[11] Id. at ¶ 83.

[12] See, e.g., Common Carrier Action; Bureau Releases First Decision in Highly Successful "Rocket Docket" (Report No. CC 99-10), DA 99-609 (March 30, 1999) ("[c]ommonly referred to as the "rocket docket" . . . The Commission instituted the Accelerated Docket process last July in realization of the need to establish a speedy method of resolving disputes between carriers that can keep pace with the fast-changing telecommunications industry. . . The Bureau is also using the Accelerated Docket as an element of its recently-established rapid-response system, which is intended to minimize the disputes that may arise between carriers.. . ."); Doing Things Differently: The Enforcement Bureau's First Year;

Remarks of David H. Solomon Chief, Enforcement Bureau, 2000 FCC Lexis 5162 (September 27, 2000) ("Strong local competition enforcement is a top priority for the Commission and our Investigations and Hearings Division."); Section 257 Report to Congress; Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses (Report), 15 FCC Rcd. 15376, 15434 (2000) ("[a]lternative dispute resolution facilitates a private resolution, obviating the need for a labor- and time-intensive Commission investigation and costly litigation. A subset of this mediation effort involves the Accelerated Docket, which the Commission created to address selected carrier-to-carrier disputes.")

Viewed in the above light, the language from Paragraph 84 of the *Collocation Remand Order* appears very far removed from an abdication by the Commission of its obligation to enforce its own rules and regulations. As discussed below, the Commission's commitment to enforcing its collocation rules is also well-evidenced in its discussion of the other ground upon which the incumbent LECs' cross-connect obligations are founded, Section 201.[13] However, to the extent the Joint Petitioners remain concerned that the Commission may allow incumbent LECs to evade their cross-connect obligations by dragging out or otherwise manipulating the interconnection process, ASCENT urges the Commission to issue a clear statement that no such end-run of the pro-competitive goals of the Telecommunications Act will be permitted by the Commission regardless of whether evidence of incumbent LEC refusal to comply with the Commission's cross-connect rules arises within the context of Section 251, Section 201, or as the cross-connect rules specifically provide, Section 208.

Totally apart from incumbent LEC obligations pursuant to Section 251, the

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[13] Described by the Commission recently as embodying "the Commission's general obligation under the Communications Act to protect and promote the public interest," (Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services (Order), ND File No. W-P-D-517 (released September 24, 2001)), Section 201 has always been vigorously enforced by the Commission. Other recent examples of Commission investigation of all credible allegations of Section 201 violations include Gerri Murphy Realty, Inc. v. AT&T Corporation (Memorandum Opinion and Order), File No. EB-01-TC-F008 (released October 15, 2001) ("whether conduct with regard to unauthorized calls was unreasonable in violation of Sections 201(b), 203 and 206 of the Communications Act of 1934, as amended."); AT&T Corp. v. Business Telecom, Inc., Sprint Communications Company, L.P. v. Business Telecom, Inc., (Order), EB-01-MD-001, EB-01-MD-002 (released September 27, 2001) ("referral from the United States District Court for the Eastern District of Virginia . . . access rates . . . unjustly and unreasonably high, in violation of section 201(b) of the Act."); AT&T Corporation v. Jefferson Telephone Company (Memorandum Opinion and Order), File No. E-97-07 (released August 31, 2001) (violation of "section 201(b) of the Act by breaching its duty as a common carrier"); AT&T Corp v. Winback and Conserve Program, Inc. (Memorandum Opinion and Order), File No. E-97-02 (released August 23, 2001) ("alleges violat[ion of] section 201(b) of the Act by changing the 800-number service provider of 40 end users . . ."); AT&T Corp. v. U S West Communications, Inc.; MCI Telecommunications Corporation v. U S West Communications, Inc. (Hearing Designation Order), EB Docket No. 01-172; File No. E-97-28s; EB Docket No. 01-173; File No. E-97-40s (released August 1, 2001) ("alleged that the Service violated sections 201(b) and 271 of the Act.).

Commission has found that pursuant to Section 201 "it would be unjust and unreasonable for an incumbent LEC to refuse to provision cross-connects between two collocated competitive LECs."[14] This conclusion is consistent with the Commission's determination that "incumbent LEC-provisioned cross-connects between collocators within the incumbent's premises constitute a 'communications service' 'necessary or desirable in the public interest' within the meaning of Section 201(a)."[15] The Commission continued that

> '[b]ecause most facilities-based competitive LECs must collocate at incumbent LECs' premises, incumbents have the opportunity to efficiently interconnect with competitive LECs. If an incumbent LEC refuses to provision cross-connects between competitive LECs collocated at the incumbent's premises, the incumbent would be the only LEC that could interconnect with all or even any of the competitive LECs collocated at a common, centralized point – the central office. In addition, if collocating competitive LECs cannot interconnect with each other at the incumbent's premises, they typically must use incumbent LEC transport facilities to obtain access to competitive transport facilities. The costs associated with purchasing incumbent LEC transport in addition to the costs associated with purchasing the competitive transport would severely restrict the viability of competitive transport."[16]

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[14] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Fourth Report and Order), CC Docket No. 98-147, FCC 01-204 at ¶ 59.

[15] Id. at ¶ 63.

[16] Id.

Finding that "cross-connects between collocators within an incumbent's premises are essential to the development of a fully competitive transport market,"[17] the Commission refused to put incumbent LECs in a position to "impose significant wasteful economic costs on competitive LECs – costs that incumbent LECs themselves do not face and costs that the incumbents do not impose on competitive LECs that utilize the incumbent's transport services."[18]

Furthermore, the Commission continued, "an incumbent LEC's refusal to provision cross-connects" would be "an unjust and unreasonable practice in connection with existing services of incumbent LECs"[19] under Section 201(b) of the Commission's rules, pursuant to which "[a]ll charges, practices, classifications and regulations for and in connection with such communication service, shall be just an reasonable and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."[20] Further clarifying the extent of the incumbent LEC's obligation, the Commission made clear that

> [i]n making available a cross-connect offering, we find that, pursuant to its obligations to provide a communications service upon reasonable request, an incumbent LEC must provide the appropriate cross-connect requested by the collocated competitive LECs. We note that the 'appropriate' cross-connect facility may constitute a 'lit' service or a dark fiber service depending upon the requirementsof the two collocated competitors. Requiring carriers to purchase a 'lit' service when they only require unlit fiber cabling would add significant expense and almost assuredly would make the competitive transport cost-prohibitive and uneconomical."[21]

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17 Id. at ¶ 65.

18 Id. at ¶ 64.

19 Id. at ¶ 72.

20 47 U.S.C. § 201 (b).

21 Deployment of Wireline Services Offering Advanced Telecommunications Capability (Fourth Report and Order), CC Docket No. 98-147, FCC 01-204 at ¶ 74.

The Commission has also directed incumbent LECs "in provisioning cross-connects" to "use the most efficient interconnection arrangements available that, at the same time, impose the least intrusion on their property interest,"[22] citing as an example the provisioning of a cross-connect, where technically feasible, at or near a collocator's equipment, rather than the incumbent's main distribution frame, when that equipment is closer to the collocator's space, and "to provision these cross-connects in a time frame no longer than that which the incumbent provides itself or any affiliate or subsidiary."[23]

The above-quoted statements from the *Collocation Remand Order* make clear that an incumbent LEC's refusal to comply with the FCC's cross-connect rules will constitute a clear violation of Section 201, while the Commission's recent releases give every indication that it intends to continue its long-standing policy of thoroughly investigating all complaints alleging carrier violations of Section 201 (through both the "rocket docket" and the traditional Section 208 formal complaint procedure). Additionally, the Commission's Enforcement Bureau has been specifically tasked with the resolution of "complaints, including complaints filed under Section 208 of the Communications Act, regarding acts or omissions of common carriers."[24]

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22 Id. at ¶ 76.

23 Id.

24 Enforcement Bureau Homepage, www.fcc.gov.

"Local competition is at the heart of the new enforcement focus at the FCC. The Enforcement Bureau is a critical part of the agency's plan to preserve and promote the competitive gains that have been made under the Telecommunications Act of 1996 and the FCC's implementing regulations."[25] Of particular use in this endeavor, "[t]he Bureau's Market Disputes Resolution Division," which "handles formal complaints filed under Section 208," is "responsible for the resolution of complaints against common carriers (wireline, wireless and international) by competitors and other carriers involving market issues" and "will utilize the accelerated complaint resolution process in appropriate circumstances"[26] to reach this goal.

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[25] Id.

[26] Market Disputes Resolution Division Homepage, www.fcc.gov.

Giving even greater assurance that it intends to fully enforce its cross-connect rules and regulations, it is to the Section 208 complaint process that the *Collocation Remand Order* directs incumbent LECs to turn in order to contest a particular carrier's ability to take cross-connect services on a federal basis (i.e., from an incumbent LEC's federal tariff) based upon the interstate nature of the services provided by the competitive LEC. Noting that "[p]hysical connections between collocators and other carriers, like other portions of the telecommunications network, typically transmit both interstate and intrastate traffic,"[27] and that the agency has "typically exercised that jurisdiction . . . when the amount of interstate traffic . . . constitutes more than ten percent of all traffic transmitted over that line,"[28] the mandates that incumbent LECs "shall promptly provision the [cross-connect] service" whenever a collocator requesting cross-connects pursuant solely to Section 201 "provide[s] a certification to the incumbent that it satisfies the *de minimis* threshold of ten percent."[29] The Commission is emphatic that "[t]he incumbent cannot refuse to accept the certification . . . . If the incumbent feels that the certification is inaccurate, it can file a section 208 complaint with the Commission."[30]

Given the Commission's obligation to both promulgate and enforce rules and regulations implementing the local competition and other goals set forth in the Telecommunications Act, as well as its self-initiated efforts to continually refine and make more efficient its enforcement mechanisms, it is apparent that the Commission fully intends to, and will, enforce its cross-connect

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27 Deployment of Wireline Services Offering Advanced Telecommunications Capability (Fourth Report and Order), CC Docket No. 98-147, FCC 01-204 at ¶ 77.

28 Id.

29 Id. at ¶ 78.

30 Id.; §51.323(h)(2).

rules whenever violations occur. Whether such violations are brought before it pursuant to Sections 201, 208 or 251 the result would be the same: incumbent LEC refusals to comply with the Commission's cross-connect rules will not be tolerated. In ASCENT's opinion, the *Collocation Remand Order* leaves no doubt; however, in order that there should be no ambiguity whatsoever, ASCENT joins the Joint Petitioners in urging the Commission to issue a direct statement confirming its continued commitment to enforcing the cross-connect rules set forth in the *Collocation Remand Order*.

The Joint Petitioners also ask the Commission to confirm that incumbent LECs must include the rates, terms and conditions of their cross-connect services in their respective federal tariffs. ASCENT concurs. The Commission recognizes that "[p]hysical connections between collocators and other carriers, like other portions of the telecommunications network, typically transmit both interstate and intrastate traffic,"[31] and for that reason, directs incumbent LECs to provide the requested cross-connect without delay -- on the basis of the Commission's Section 201 authority alone -- whenever a competitive LEC certifies to the more than *de minimis* level of its interstate traffic. To the extent an incumbent is providing cross-connects for the purpose of facilitating the competitive LEC's provision of jurisdictionally significant interstate traffic, the cross-connect service is a "'communications service' 'necessary or desirable in the public interest' within the meaning of section 201(a)";[32] *i.e.*, a federal communications service. To provide such a service on a common carrier basis, as the Commission has compelled incumbents to do, that

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[31] Deployment of Wireline Services Offering Advanced Telecommunications Capability (Fourth Report and Order), CC Docket No. 98-147, FCC 01-204 at ¶ 77.

[32] Id. at ¶ 63.

service must be contained in an effective federal tariff.[33] Accordingly, it is appropriate that the Commission direct all incumbent LECs subject to the collocation rules to set forth the rates, terms and conditions for cross-connect service in their respective federal tariffs.

In keeping with the above, ASCENT urges the Commission to issue clear statements (i) evidencing its intent to fully enforce the cross-connect rules set forth in the *Collocation Remand*

[33] 47 U.S.C. § 203.

Order and (ii) directing incumbent LECs to set forth the rates, terms and conditions of their cross-connect services in their respective federal tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Catherine M. Hannan, do hereby certify that a true a correct copy of the foregoing Comments of the Association of Communications Enterprises has been served by the First Class Mail, postage prepaid, on the individuals listed below, on this 19th day of October, 2001:

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